

Maslaha Al Mursalah; the concept, sources, history and benefits as a source of Islamic Law

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1. Abstract

It is common understanding that less than twenty percent of the elements of Fiqh in Sharaiah law are sourced directly from the canonical texts of Islam (the Qur'an and the Sunnah). Other acknowledged primary sources of Fiqh include Ijma'a (consensus of the scholars) and Qiyas (analogy).

Secondary sources which have also been used extensively in Islamic history include Istishan (presumption of continuation), istishab (juristic preference), Urf (customs), Sadd ad Daraa'i (Blocking the means), the tradition of the people of Medinah, and Maslaha al Mursala (public benefit).

In this paper, we attempt to explain the concept of Maslah al Mursalah, the authority backing its use, and to explain the history of its application and the importance as a source of Fiqh in today's world with changing and sometimes unprecedented situations.

2. Introduction

The major aspects of human endeavors and rights are already covered extensively under the Akham al shariah (Principles of Shariah). However, we continue to experience dynamism in several aspects of our lives. In a number of these cases, the canonical texts (Qur'an and Sunnah) do not expressly take a permissive or prohibitive position on these issues. Also, in some very specific cases there are no precedents to facilitate the use of some of the established legal frameworks within the Usul Fiqh that depend on precedents.

Maslaha al Mursalah comes in handy as a possible source of guidance in these situations. The basic interpretation of Maslaha is 'public interest or benefit'. In other words, it is a principle that allows Muslims to leverage tools used in contemporary fields such as economics, science, governance etc., to synthesize laws and rules that benefit us and that are in consonance with the principles of the Shariah.

This write up is an attempt to explain this important concept (Maslaha), to highlight the authority upon which its use is based, and to explain the history of its application and effects on the Muslim Ummah both in medieval times and in the modern world.

In the first two chapters (2 and 3), we explain history of the word Maslaha and define the concept. In the succeeding two chapters, we highlight some verses in the canonical texts (Qur'an and Sunnah) that have been quoted in favour of Maslaha as a source of Islamic Law. In the final chapter, we highlight a few examples of the application of Maslaha in policy making both in early Islamic history and in the modern times.

3. The concept and meaning of Maslaha Al Mursalah

Maslaha Al Mursalah is a concept in traditional Islamic Law. The word Maslaha is taken from the root word “Saluha” or “Salaha” which means to be good or to repair or to do good. Istislah on the other hand refers to the methods used by Muslim jurists to solve problems (a good deed) especially when there are no explicit guidance from the Qur’an and the Sunnah on such matters.

Maslaha as a derivative concept literally means benefit or interest which is quite a generic expression. However, when qualified to Maslaha Al Mursala, it means the benefit or interest of the public. In this case the public refers to the majority and this can include the Muslim Ummah and in fact non-Muslims (Lahsasna, 2011).

Al Ghazali (d. 505/111 CE) defined Maslaha as the considerations which secure the benefit or prevent harm but is in harmony with the aims and objective of the Shariah. These objectives consist in protecting the five essential values and principles (Al Dharuriyat) of the Shariah which include, the right to religion, the right to life, the right to property, the right to intellect and the right to community (lineage).

According to Al Ghazali, any action or measure taken to secure these five values as well as any action taken with the aim of preventing evil (Mafsadah) is termed Maslaha.

When this is done in the context of a community, a state, the whole Ummah or mankind in general, it is termed Maslaha Al Mursalah.

4. The authority of Maslaha al mursalah

There are no specific verses in the Qur'an or the Sunnah which explicitly validate the usage of Maslaha mursalah as a source of Shariah law. However there are many general verse or practices of the Prophet (PBUH) that have been quoted as a basis for the use of this broadly concessionary concept.

From the Qur'an, some of the verses quoted is:

Surat Al-Ambiya

"And We have sent you (O Muhammad) not but as a mercy for the 'Alamin (mankind, jinns and all that exists)." – 27:107

Surat Al-Ma'idah

"Allah never intends to impose hardship upon people." – 5:6

Surat Al-Hajj

"...He has not laid upon you in religion any hardship..." – 22:78

Surat Al-Baqarrah

"..Allah intends for you ease, and He does not want to make things difficult for you...." – 2:185

Some hadith and legal maxims also quoted in support for Maslaha Mursalah as a source of law include:

“La Dharara wa la Dhirar”

Harm is neither inflicted nor propagated in Islam

“Al-Mashaqqah tajlub Al-Taisir”

Hardship begets facility.

“Al Umur bi Maqsidiha”

Matters are determined according to intentions.

From all of these general sources, what is clear is that the concept of Maslaha is generally to propose a framework of rules guiding actions that are beneficial for public interest or actions that do much more good than harm to the greater public in areas of human endeavor that are not explicitly addressed by canonical sources.

5. The types and sources of Maslaha Al Mursalah

Maslaha Al Mursalah is of three types; Al Dharuriyyat (or the essential), Al Hajitat (or the complimentary) and Al Tahsiniyat (the embellishments).

Maslaha Al Dharuriyat refers to those actions or deeds that are absolutely essential. A neglect of any of these actions or deeds could lead to damaging circumstances or chaos to the community. Obviously these include all actions that are taken to protect life, property, religion, lineage and intellect. A suitable example of Maslaha Al Dharuriyat could be a legislation that prescribes a “death penalty” for premeditated murder.

Maslaha Al Hajiyyat on the other hand refers to actions supplemental to the five essential values whose neglect could lead to hardship of certain elements or all of the community but not essentially to a collapse. Some examples of cases where Maslaha Al Hajiyyat has been applied include (but not limited to) concession of the sick from fasting, the exemption of menstruating and pregnant women from fasting and also the permission for travelers to shorten the obligatory prayers (Qasr Salah).

Then the third type, Maslaha Al Tashsiniya refer to actions and deeds that lead to the improvement of the community and elevates it to the desirable status. An example of such an action commonly seen in the modern era is the building of grand mosques. Some of these edifices (Blue Mosque-Istanbul, Sheikh Zayed Grand Mosque –Abu Dhabi), are towering and serve to remind visitors of the grandness and greatness of Allah (SWT). However, should there have been dire need for survival in the countries where these mosques are built, having them would have been unnecessary.

In terms of source, Maslaha Al Mursala is classified into Mu'utabarah (directly from the law giver), Mulghah and Mursalah.

According to Lahtasna (2011), the first Maslahah (Mu'tabarah) as actions which the Qur'an or Sunnah has expressly upheld and enacted a law for its realization. Examples in this case include the laws enacted for retaliation for premeditated killing, the laws that subject the thief to punishment or in fact the punishment for adultery. These laws prevent societal ills that lead to loss of life, property and lineage which are all key values of the Shariah therefore all Muslim

scholars are in unanimous agreement that these laws and other similar laws should be promoted and the framework (Mu'tabarrah) should constitute a proper ground for legislation.

The second type of Maslaha (Al Mulghah) are actions and deeds that have been nullified and are either explicitly stated in the canonical sources or indicated in the Shariah. The Muslim scholars are in agreement that any legislation in pursuance of such activities are illegal and no judicial decree should be issued in their favour. Similarly the practice of people that is included in this category is invalid and cannot be considered. An example of such an action is the practice of usury in transactions, even though this is common among people, it is invalid because the maslaha in this case is clearly nullified.

Another example is the attempt to give the son and daughter of a deceased man equal shares in his wealth with the assumption that this might promote Maslaha to the community. However, since there is a clear verse in the Qur'an that assigns one half of the wealth to the male heir and one third to the female, this Maslaha is therefore nullified.

The third type of Maslaha are those actions, deeds or preventions that were validated after the divine revelation came to an end. These are called Maslaha mursalah. For this type of Maslahah, there is neither a text that validates it nor invalidates it.

There are a lot of legislations in the past that have been based on this kind of Maslahah. The prime example often mentioned in literature including Lahasna (2011), is the compilation and codification of the Qur'an which was ordered by Caliph Abubakar (AS) and carried out by the companions of the Prophet (PBUH). Other classical examples include the introduction of currency by the companions of the Prophet (PBUH), the establishment of prisons, the fight against zakah

evasion, the introduction of land tax, the consignment of resourceful lands to the public as opposed to allowing individual ownership, the nomination of Umar bin Al-Khattab (AS) to succeed Abubakar (AS), and several other cases, the ruling of Umar (AS) that his officials must be accountable for the wealth accumulated in the abuse of public office and the expropriation of such wealth.

These including several other cases show how Maslahah has been used in the past in areas where there were no explicit rulings from the canonical sources (Qur'an and Sunnah).

6. What makes a legislation based on Maslaha al Mursalah valid?

Successive scholars of Islam have set a framework within which legislation based on Maslaha can be validated in order to ensure that this leverage or concessionary means of legislation is not abused and used for arbitrary desires or personal interest.

A first condition in this framework is that the Maslaha (benefit) must be genuine (haqqiqi) in its aim to protect the rights of man Shariah. It should evidently be seen how this action helps to prevent sedition or clarify misunderstandings about the Islamic belief system (protection of faith), or how the action creates an enabling and caring environment for children (protection of lineage), how the action prevents unnecessary injury to man and animals or loss of life (protects life), how the action ensures justice in trade and other financial transactions (protects property) or how the action incentivizes research and development and discourages laziness (protection of the intellect)

The second condition in this framework is that the Maslaha has to be general (Khulliyah) which means it prevents harm or benefits the people as a whole and not a selected few. Examples of these actions could include the consigning resourceful land to the public as opposed to individual ownership, imposing taxes and anti-dumping laws on importation of certain resources, products and services that could be effectively sourced locally, setting up adequate surveillance networks to keep crime in check and maintain law and order in the society. These actions are seen obviously to benefit a wider public as opposed to certain personal interests and so pursuing legislation in this regard are encouraged.

The third condition is that actions considered Maslaha must not contradict any teachings, principles or values held by the Qu'ran, the Sunnah or those arrived at through Ijma'a (consensus of opinion of the scholars). Examples in this regard can be actions related to usury, prostitution, working in bars, female photo advertising and nudity. Though these actions provide job opportunities and create new sources of revenue for some members of the public, they cannot be permitted on the basis of Maslaha, because they all explicitly go against the values and teachings of the canonical sources. Legislation pursuing these kind of interests are strongly discouraged.

7. Historical and modern examples of maslaha being applied as a basis for legislation.

In the previous chapters, I explained in detail, the authority, sources and types of Maslaha. Here I would try to explore and analyze a few examples to show how legislation based on Maslaha

impacted the early Muslims. Also I would touch briefly on a few current examples in our time where a country (Malaysia) has applied the principles of Maslaha to the benefit of their citizens.

Most of the historic examples are familiar in literature and have been mentioned briefly in the previous sections. However, the aim here is to animate these historical occurrences by highlighting the context within which they happened and to show the positive impacts they had on the people of the times and in some cases, how these impacts have been propagated to our era.

The first example to discuss is the fight against “tax alms” (Zakah) defaulters which was wholly embarked upon by the first Caliph of Islam – Sayyidina Abu Bakr (AS).

Looking in detail at some sources of history, one could suggest that this fight against “tax alms” defaulters in itself may not be the perfect example of Maslaha since according to these accounts, some of the defaulters actually gave their Zakat directly to the needy and poor as opposed to channeling these contributions to the newly established administration in Medina which was led by the first Caliph, Sayyidina Abu bakr (AS)¹. According to these reports, not all of the Muslims in the time immediately accepted the choice of Sayyidina Abu Bakr (AS) as the Caliph and leader of the Muslims after the passing away of the Prophet (PBUH) and hence the reason they refused to pay Zakat to the newly established government.

Having said this, it is imperative to note that the very important point missed in the events by most writers on Maslaha Mursala is the establishment of the Caliphate and the Imamate institutions. It can be argued that this is one of the greatest acts of Maslaha of all time in the

¹ <http://www.al-islam.org/history-of-the-caliphs-rasul-jafariyan/abu-bakr%E2%80%99s-caliphate>

history of Islam. If we consider the alternative situation, where these two institutions were not invented, the Muslims of the time would have been deprived of the much needed leadership structure after the passing away of the Prophet (PBUH).

The direct effects of these two institutions can be seen in the much reported successes of the caliphacy of Sayyidina Abu Bakr (AS) in combating Apostasy, starting with the firmness of Medina on the issue, and later Mecca and the rest of the Umma at the time. Also with the compilation of the Qur'an which we now have as one book today started at this time, and was easier to coordinate under an established system.

Also, these were undoubtedly key steps in protecting the religion of Islam (Dharuriyyat) and so the contributions (tax alms) when seen in the light of a means to run a newly established leadership system, one would say they were very necessary and so policies that enabled to fight against defaulters could be considered Maslaha.

Another example carefully chosen for this illustration is the attempt of Umar bin Al-Khattab (AS) – the second Caliph, to prevent the Ummah from the ills of corruption (Mafsadah).

Umar bin Al-Khattab (AS) in his time as leader managed to establish a policy framework to guide the appointment of governors, agents and military officials in the conquered lands. He followed the methods of the prophet (PBUH) and was known to appoint only those who were first **qualified**, then **trustworthy** and then **knowledgeable**, in that order².

² http://archive.org/stream/UmarIbnAl-khattabHisLifeAndTimes/Umar-Ibn-Al-khattab-Volume-2_djvu.txt

In other words, he appointed some people who were less knowledgeable in Islam but more qualified and understood the requirements of the role. It was reported that he once asked about a man whom he wanted to appoint as an agent and he was told, “O Ameer al-Mu’mineen, he does not know anything about evil.” Umar (AS) said to the man, “Woe to you, he is more likely to fall into it.” Hence the man was not appointed³.

He also did not appoint anyone who requested to be governor as he believed that selecting leaders was akin to fulfillment of a trust whereby he was obliged to select the best person he could find. To Umar (AS), turning away from the best candidate and choosing someone else would be betrayal of Allah, His messenger and the believers.

A key factor to note here, especially when compared to our modern era, is that the methods by which public officials are selected communicates a lot to the community and as well determines how effective they are in discharging their duties. If they are selected poorly there is a high risk of corruption, lack of focus and obviously a lack of adequate protection of the rights of their Muslim subjects.

Furthermore, it has been reported that Umar bin Al-khattab (AS), made it mandatory to record the assets of all his appointed governors and agents before they commenced their various assignments. In some cases, it was reported that he also investigated his appointed officials at

³ http://archive.org/stream/UmarIbnAl-khattabHisLifeAndTimes/Umar-Ibn-Al-khattab-Volume-2_djvu.txt

the time they returned from their duties and had some of them remit a significant proportion of their wealth on returning to the Bait-al-Mal⁴.

What is easily notable from all of these actions is that Caliph Umar bin Al Khattab (AS) understood very well the tendencies of power and wealth to corrupt leaders and evidently cause sufferings to the Muslims.

His act of selecting his governors, agents, and military using a transparent process surely translates to another important Maslaha in Islamic history, as it enabled prosperity and most importantly the expansion of the Islamic state in the time. This is evident in the many of victories recorded by the Muslims his time alone.

Having looked at these two examples, it is worthwhile to examine some legislations witnessed in the modern world which also could be qualified on the basis of Maslaha.

A relatively recent example in this regard would be the legislation in Malaysia that permits Islamic funds or investors to invest in companies that earn less than 5% of their income coming from interest bearing receivables. The legislation also provides guidelines to Muslim investors to cleanse their earnings from these companies at the time of sale.

Interest earning in itself is prohibited in Islam. However, looking at the current investment landscape in many countries including in Malaysia, it is quite difficult to find companies with a 100% of their income streams being interest free. Thus an attempt to boycott all interest earning

⁴ http://archive.org/stream/UmarIbnAl-khattabHisLifeAndTimes/Umar-Ibn-Al-khattab-Volume-2_djvu.txt

firms somewhat limits drastically, the investment opportunities accessible to Islamic fund managers.

Legislations such as these that help to broaden the investment horizon in the time being can be considered as Maslaha al Mursalah as it offers opportunities for Muslims in to grow their wealth and as well to purify that part of it that has been acquired wrongly in the context of Islam. This is done by giving this part away to charity.

In addition to this, there are several other more recent examples of legislated incentives in Malaysia that qualify as Maslahah.

A few of these listed by the Malaysia Islamic Finance Center (MIFC) include: a 10 year tax exemption for new Islamic Investment Banks (IIBs) and Islamic Takaful Operators (ITOs) up to 2016, a tax exemption up to 2016 on the management fees received by fund managers for managing Islamic funds, a 10-year tax exemption for existing and Islamic banks and Takaful operators to set up Islamic Currency Business Units (ICBU), Tax deductibility on certain expenses incurred to establish Islamic broking companies, Tax exemption on profits paid by licensed Islamic banks in Malaysia to non-resident customers, Withholding tax exemptions on profits received from Sukuks issued in Malaysia, Tax deduction up to year of assessment (YA) 2010 for issuance costs of Sukuks approved by the Securities Commission , 10-year stamp duty exemption on instruments executed by ICBU, IIB and ITO under MIFC, 20% stamp duty remission on certain principal or primary instrument of financing made according to the principles of Shariah and approved by Bank Negara Malaysia Bhd. or Securities Commission, Removal of restrictions on ownership and investment abroad for Islamic fund companies,

Employee Provident Fund (EPF) undertaking to provide US\$2 billion (RM7 billion) in investment mandates to Islamic fund managers⁵.

All of these incentives have been conceived to promote Islamic Finance and the Islamic economic system as a viable alternative to the mainstream system which is essentially based on usury. It is important to note that none of these legislations have been established to be directly sourced from any of the canonical texts (Qur'an and Sunnah). However, should investors, firms and fund managers take advantage of these incentives, Malaysia would see rapid growth in investments in the finance sector as well as other sectors of the economy, creating jobs and increasing the wealth for the Ummah. This is Maslaha!

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⁵ http://www.pwc.com/en_my/my/assets/publications/islamic-finance-hub.pdf